Filed 2/22/10 P. v. Rodarte CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RICHARD CALANCHE RODARTE, Defendant and Appellant.	B215580 (Los Angeles County Super. Ct. No. KA084684)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed as modified with directions.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

Information

Defendant Richard Calanche Rodarte was charged by second amended information with one count of assault with a firearm (count one, Pen. Code § 245, subd. (a)(2))[1] and one count of attempted robbery (count four, §§ 664 and 211) with respect to victim Rosendo Bautista Nicasio (Bautista).[2] He was also charged with one count of assault with a firearm (count three) and one count of attempted robbery (count two) with respect to a second victim, Sergio Rodriguez. The information further alleged that defendant personally and intentionally discharged a firearm which caused great bodily injury to Bautista within the meaning of section 12022.53, subdivision (d); personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c); personally used a firearm within the meaning of section 12022.53, subdivision (b); and suffered a prior conviction (a 2002 violation of section 273.5, subdivision (a), infliction of corporal punishment on a spouse) within the meaning of section 667.5.

Evidence at Trial

The charges arose out of actions occurring on the evening of July 29, 2008. At trial, the prosecution established that at approximately 11:30 p.m., Bautista and his uncle were walking back to their apartment, having just purchased beer at a nearby convenience store.[3] As they reached the entrance to the apartment building, Bautista saw two men standing next to it. One of them asked for a beer. Bautista

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[1] Statutory references are to the Penal Code.

[2] Bautista Nicasio testified that he generally used "Bautista" as his surname. Therefore, we will refer to him by that name.

[3] Bautista and his uncle had been drinking for about an hour.

told the man to get a job. "[A]ll of a sudden," defendant approached from the direction of a nearby motel, a Budget Inn. Defendant was holding a pistol in his hand. He shot the pistol twice into the ground close to Bautista's feet. Bautista did not hear him say anything before the shots were fired. Fragments from the shots hit Bautista's feet, which began bleeding.[4]

Defendant next confronted Rodriguez, who was bicycling to his apartment, located in the same complex as Bautista's.[5] Rodriguez testified that prior to his confrontation with defendant, he saw four men, including Bautista, engaged in a loud argument in front of the complex. He told them to stop and go to bed. As he was separating them, defendant, holding a pistol, approached the group from the direction of the Budget Inn. Defendant asked Bautista for beer and money while shooting twice at the ground next to Bautista. At some point, Rodriguez heard Bautista say he was not going to give defendant any beer or money.[6]

When Rodriguez heard the shots, he became afraid and hurried inside the gate of the apartment complex, as did the other four men. Defendant followed them and told Rodriguez to give him the bicycle. Rodriquez, who had his back to defendant, ignored him and continued walking away. He heard another shot. People started coming out of the apartment building and defendant ran back toward the Budget Inn.

Defendant was arrested shortly thereafter attempting to escape in a car seen exiting the Budget Inn at approximately 12:30 a.m. A detective who had arrived to

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[4] Bautista was taken to the hospital, but not treated there. Later that night, a family remember removed some fragments from his feet.

[5] At the time of trial, Rodriguez was on probation for receipt of stolen property.

[6] Rodriguez was not asked and did not specify whether he heard Bautista say this before or after the shots were fired.

investigate the report of shots fired told the vehicle to stop and heard defendant say to the driver: "Fuck that vato; let's roll." The vehicle sped away and was pursued and eventually stopped by police officers.[7]

Both Bautista and Rodriguez identified appellant in photographic lineups. Two shell casings and one bullet fragment were recovered from the area. No gun was found and defendant's hands were not tested for gunshot residue.

Verdict and Sentencing

The jury found defendant guilty of all four counts and found the firearm enhancements to be true, but found not true the allegation that defendant caused great bodily injury to Bautista. The court found the allegation of the prior conviction to be true.

At the sentencing hearing, the prosecutor stated that section 654 would preclude sentencing defendant on both the assault and attempted robbery counts. The court disagreed: "I think, if you look at the gravamen of the offenses, they are independent; the assaults with a firearm and the subsequent attempted robberies. They are sufficiently attenuated . . . ."

The court chose count four (attempted robbery of Bautista) as the base and selected the high term of three years due to the violence involved, the threat of great bodily harm, defendant's conviction of multiple offenses, the existence of prior convictions (including juvenile convictions) of increasing seriousness and the fact that defendant was on parole. To the base term, the court added: 20 years based on personal and intentional discharge of a firearm with respect to count four; two years (one-third the midterm) for count two (attempted robbery of Rodriguez);

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[7] Defendant was initially arrested for being drunk in public.

and six years, eight months (one-third 20 years) based on personal and intentional discharge of a firearm with respect to count two. The court also imposed concurrent sentences of three years, plus a four-year firearm enhancement for both count one (assault on Bautista) and count three (assault on Rodriguez).

DISCUSSION

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 precludes multiple punishments for a single act and also for multiple acts constituting an indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294.) The purpose of the statute "is to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

Defendant contends that the trial court's imposition of separate sentences for both the assault and the robbery of each victim violated section 654's prohibition on multiple punishments for a single act or indivisible course of conduct. Defendant contends the evidence established that the assaults were in furtherance of the attempted robberies rather than separate acts of violence. Our review of the testimony of Rodriguez, the only witness to testify concerning the relation between the attempted robberies and the shootings, convinces us that defendant is correct.

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than

one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) But "[i]f [a defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639; accord, *People v. Latimer* (1993) 5 Cal.4th 1203, 1216.)

Generally, an assault committed in connection with a robbery is considered incidental to the objective of robbing the victim and section 654 applies to preclude imposition of a separate sentence for the assault. (See, e.g., *People v. Beamon*, *supra*, 8 Cal.3d at p. 637 ["[O]ne who uses a deadly weapon in the commission of first degree robbery simultaneously assaults the victim with such weapon but clearly may not be punished for both the robbery and assault with a deadly weapon."]; *People v. Aldridge* (1961) 197 Cal.App.2d 555, 558-559 ["Where the force relied upon to establish the robbery is the same as that required to prove the assault the accused cannot be punished for both acts without violating section 654 of the Penal Code."].) An exception applies where the assault occurs after the robbery is complete or where it "constitute[s] . . . gratuitous violence against a helpless and unresisting victim." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 190 [defendant's accomplice relieved victim of valuables at gunpoint, took him into back room, and shot him after he obeyed command to lie down on floor]; see, e.g., *People v. Massie* (1967) 66 Cal.2d 899, 908 [after victim surrendered his wallet, defendant said "'Don't look at me,'" and shot him]; *In re Chapman* (1954) 43 Cal.2d 385, 388-389, italics omitted [where victim handed over wallet and money at gunpoint and was hit with gun while attempting to run away, "the evidence warrant[ed] a finding that there was a threat of force sufficient to put the victim in fear and that he was put in fear and the robbery thereby accomplished,

and since such threat of force [was] different from the actual application of force relied upon to establish the assault . . . , both offenses may be punished"].)

The question whether section 654 is applicable to the facts presented at trial is for the trial court, and its findings "must be upheld on appeal if there is any substantial evidence to support them." (*People v. Hutchins*, *supra*, 90 Cal.App.4th at p. 1312.) Where the evidence is conflicting, "'[w]e must "view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" [Citation.]' [Citation.]" (*Id.* at pp. 1312-1313.) Where the evidence is not conflicting, the applicability of section 654 is a question of law to be resolved de novo. (*Neal v. State of California*, *supra*, 55 Cal.2d at p. 17.)

On appeal, respondent contends that there was evidence from which it could be inferred that defendant shot at the victims not to facilitate the attempted robberies, but in anger and frustration when the robberies were thwarted by the victims' noncooperation.[8] Respondent argues that the evidence was sufficient to support a separate intent and objective because it appeared that the shootings did not take place "at the outset" of the robberies. It is not necessary for the assaults to take place at the outset in order for section 654 to preclude separate punishment for an assault occurring during the course of a robbery or attempted robbery. Where the victim is initially recalcitrant, application of additional force is generally considered part of the continuous course of conduct connected with the robbery offense. (See, e.g., *People v. Ridley* (1965) 63 Cal.2d 671, 672, 678 [where

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[8] We note that at trial, the prosecutor did not attempt to prove or argue that the assaults and robberies were separate incidents. Indeed, as noted, at sentencing the prosecutor stated his belief that section 654 barred separate punishments for both the assault and the attempted robbery as to each victim.

proprietor of pawnshop was shot after trying to knock gun from defendant's hand and ducking behind counter, "the assault . . . was the means of perpetrating the robbery and [] both offenses were incident to one objective, robbery"]; *People v. Logan* (1966) 244 Cal.App.2d 795, 798, overruled in part on other grounds by *People v. Collie* (1981) 30 Cal.3d 43 [where restaurant owner laughed at defendant's pronouncement that "'This is a holdup,'" and thereafter defendant fired shots, first into floor and then into owner's leg, in attempt to persuade owner to open safe, section 654 precluded punishment for both robbery and assault with intent to commit murder]; *People v. Gilbert* (1963) 214 Cal.App.2d 566, 568 [where defendants first brandished guns and then struck storeowner several times in attempt to rob store, "same force cannot afford a ground for separate punishment for assault with a deadly weapon"].)

Moreover, Rodriguez's testimony with respect to both attempted robberies indicates the demands and the shooting were contemporaneous. With respect to the attempted robbery of Bautista, Rodriguez put the shooting virtually simultaneous with the demand for money and beer.[9] In the sole question that related to timing, Rodriguez testified that defendant fired the shots "[*w*]*hen* he asked [Bautista] for the beer and the money," stating specifically that defendant did not point the gun at Bautista when he made the demand, but instead "shot the ground next to him."[10] (Italics added.)

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[9] Bautista consistently denied -- on both direct and cross -- that defendant said anything or made any demand before or after shooting at Bautista's feet.

[10] Respondent attempts to rely on *People v. Sandoval* (1994) 30 Cal.App.4th 1288, where the victim -- a convenience store clerk -- did not comply with the demand for money, but slammed the register drawer shut and attempted to reason with the defendant. The defendant shot him point blank in the chest and left the store without making any further attempt to rob it. (*Id.* at pp. 1295-1296.) The Court of Appeal concluded that imposition of separate punishments was appropriate because the evidence established that
(Fn. continued on next page.)

With respect to the attempted robbery of Rodriguez, he testified that defendant told him to hand over the bicycle after both men had entered the grounds of the apartment complex and that "everything was very fast." When asked whether defendant was pointing the gun at him when making the demand, Rodriguez said: "I was giving him my back so I don't know if he was pointing or not," but that defendant "did ask for my bicycle" and "shot again or fired again inside [the apartment complex]." Rodriguez's testimony did not support that the shot fired in connection with the attempt to steal the bicycle was fired out of anger or a desire for retribution. The prosecutor asked whether defendant fired the final shot as he was leaving the complex, and Rodriguez indicated to the contrary: "[Question:] You indicated when he was leaving was there another shot? [¶] [Answer:] No. He fired when he asked me for the bicycle, when we went inside where the mailboxes are at."

We have no quarrel with the general proposition advanced by respondent, that in the appropriate situation, an assault committed in the aftermath of a robbery or an attempted robbery having no real connection with the robbery may support imposition of a separate punishment. In this case, however, the only evidence presented was that the shootings occurred contemporaneously with the demands for valuables and as part of the continuous course of conduct connected with the attempted robberies. Accordingly, the sentences for counts one and three should

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the attempted robbery was complete when the clerk refused to hand over the money, and that the defendant shot him solely "to punish [him], or to assuage his own thwarted desires." (*Id.* at pp. 1299-1300.) At one point during his testimony, Rodriguez made reference to hearing Bautista say he would not comply with the demand for money and beer -- a statement Bautista did not recall making. As there was no evidence of when such statement was made, *Sandoval* does not support respondent's position. Moreover, unlike the defendant in *Sandoval* who shot to kill, defendant fired at Bautista's feet, an act more indicative of an intent to intimidate him into obeying than to punish him for disobeying.

have been stayed. (See *People v. Deloza* (1998) 18 Cal.4th 585, 591-592 ["If . . . defendant suffers two convictions, punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed."]; *People v. Cruz* (1995) 38 Cal.App.4th 427, 434, quoting *People v. Miller* (1977) 18 Cal.3d 873, 887, italics omitted ["'It has long been established that the imposition of concurrent sentences is precluded by section 654 . . . because the defendant is deemed to be subjected to the term of both sentences although they are served simultaneously.'"].)

DISPOSITION

The sentences imposed on counts one and three are stayed pursuant to section 654. In all other respects, the judgment is affirmed. The clerk of the superior court is directed upon issuance of the remittitur to prepare a corrected abstract of judgment as set forth in this opinion and to forward it to the Department of Corrections and Rehabilitation.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.